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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Petition of)

CELLULAR COMMUNICATIONS)
OF PUERTO RICO, INC.,)

RM-8897

To Determine Whether Competitive)
Bidding Procedures Should Be Used)
To License Rural Service Areas)

To: Wireless Telecommunications Bureau

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Federal Communications Commission
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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

Bell Atlantic NYNEX Mobile, Inc. (BANM) supports the September 9, 1996, petition of Cellular Communications of Puerto Rico, Inc. (CCPR), which requests that the Commission use competitive bidding to award authorizations for certain rural service area (RSA) cellular markets.¹

SUMMARY

The Commission both can, and should, adopt rules for auctioning these markets. The Commission has ample legal authority to change its processing procedures and conduct an auction to award RSA licenses where the original lottery winners were disqualified. Moreover, there are compelling public interest reasons which require the Commission to invoke its auction authority here.

¹"Public Comment Invited: Cellular Communications of Puerto Rico, Inc., Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should be Used to License Certain Cellular Rural Service Areas," Public Notice, October 24, 1996 (DA 96-1685).

BANM thus requests that the Commission grant CCPR's petition, and conduct a rulemaking to establish auction procedures which will enable maximum participation by all parties interested in providing service to "open" RSAs.²

I. THE COMMISSION HAS THE LEGAL AUTHORITY TO USE AUCTIONS FOR LICENSING RSAs.

There can be no dispute that the Commission has the authority to award licenses for all unlicensed cellular RSA markets by competitive bidding. In the 1993 Budget Act, Congress added Section 309(j) to the Communications Act to authorize the use of auctions to select among applications for CMRS licenses.³ This action was based on Congress's finding that there were clear public interest benefits in supplanting lotteries with auctions.⁴ It granted the Commission authority to rely on auctions for awarding licenses in markets for which applications had been filed before the effective date of the Budget Act (July 26, 1993) as well as after. And the Commission has repeatedly stated that Section

²This rulemaking would establish the competitive bidding procedures for awarding licenses in all remaining "open" RSA markets, where the Commission has disqualified the tentative selectee in the lottery, or where the authorization has been revoked. The Commission has recently adopted competitive bidding rules for the auctioning of certain cellular unserved area applications. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Ninth Report and Order, FCC 96-361, PP Docket No. 93-253, released November 7, 1996. ("Unserved Areas Auction Order"). Those rules can serve as the model for auctioning cellular RSAs as well.

³Omnibus Budget Reconciliation Act of 1993, Title VI, § 6001(b), adding new Section 309(j) to the Communications Act.

⁴See H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 252-54 (1993) (finding that it was in the public interest to use auctions instead of lotteries to award spectrum).

309(j) of the 1993 Budget Act empowers it to use competitive bidding procedures to award radio licenses in this situation.⁵

While the cellular RSA markets identified in CCPR's Petition involve still-pending applications which were filed at the time that lotteries were used to award licenses, this does not negate the Commission's statutory authority to use auctions. The Commission has held in many contexts that it has the authority to change the procedural rules for granting radio authorizations, and has made such changes where it determines that the public interest so requires.⁶

The Commission's 1984 Cellular Lottery Order⁷ provides on-point precedent for its legal authority to change the procedure for awarding new cellular licenses where applications had previously been filed. In the early licensing phases for the then-new cellular service, the Commission had initially accepted applications under rules that used a "comparative hearing" process to resolve mutually

⁵Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348 (1994) ("Second Report and Order"); Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order, 10 FCC Rcd 9589 (1995).

⁶See Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in 2.1 and 2.5 GHz Bands, 8 FCC Rcd 1444, 1447 (1993) citing United States v. Storer Broadcasting Co., 251 U.S. 192 (1956); Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

⁷Amendment of the Commissioner's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries instead of Comparative Hearings ("Cellular Lottery Order"), 98 FCC 2d 175 (1984); recon., 101 FCC 2d 577 (1985).

exclusive applications. After applications had been filed, the Commission decided that comparative hearings were imposing unacceptable costs and burdens, and were delaying commencement of cellular service. It thus replaced the hearing process with lotteries (which Congress had authorized in the 1982 amendments to Section 309). The Commission rejected the arguments of parties with applications already on file that changing to lotteries constituted unlawful retroactive regulation, and that they had a right to the comparative hearing process. 98 FCC 2d at 182-84.

The D.C. Circuit upheld the Commission's substitution of lotteries for comparative hearings. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). The court rejected the claim of an applicant for the Fresno, California, market that adopting the new lottery procedures for markets where comparative hearing applications had been previously filed was invalid retroactive rulemaking. It found that pending applicants had no legal right to the same hearing process that was in place when their applications had been filed, and that the costs they had incurred in preparing a comparative application did not constitute any actionable injury or otherwise give them such a right. Id. at 1554-55. Moreover, the court found that retroactive application of the lottery procedure furthered the purposes Congress had sought to achieve with lotteries. "We conclude that the Commission's decision to apply the lottery in the Fresno market to applications that were already filed was within its statutory authority and was fully justified." Id. at 1556.

The Cellular Lottery Order and Maxcell make it clear that the Commission may supplant lotteries with auctions for all unlicensed RSA cellular markets.

II. THE PUBLIC INTEREST REQUIRES THE USE OF AUCTIONS.

It is equally clear that auctioning the remaining unlicensed RSA markets will achieve the Commission's public interest goals, and that continued reliance on lotteries will not.

After a decade of experience with lotteries, both Congress and the Commission decided that this selection process seriously disserved the public interest. In the 1993 Budget Act, Congress not only granted the Commission auction authority, but prohibited the use of lotteries for subsequently filed applications. The legislative history of the 1993 Act shows that Congress found that lotteries were not only inefficient, but worse, rewarded speculative applicants who then failed to construct the facilities and instead profited from selling their authorizations. As the House Report found:

Lotteries engendered rampant speculation; undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license. Many lottery applicants had no intention to build or operate a system using the spectrum, but instead only sought to acquire a license at nominal cost and then sell it, making a large profit and at the same time delaying the delivery of service to the public.⁸

⁸H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993) at 248. The Commission too has found that lotteries have delayed commencement of radio service to the public, and have allowed speculators to appropriate the value of radio spectrum that belongs to the public.

Congress and the Commission have also found that auctions (in contrast to lotteries) do serve the public interest. The Budget Act's legislative history reflects Congress' expectation as set forth in Section 309(j)(3) that auctions would promote the goals of the "development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." Only two months ago, Congress confirmed that its expectation has been met by directing the Commission to use auctions to license substantial new blocks of radio spectrum.⁹

The Commission has repeatedly invoked its authority to use auctions for CMRS and other radio services based on findings that they are best suited to bring new service to the public in the fastest and most efficient way.¹⁰ Just three weeks ago, in adopting competitive bidding rules for new unserved area applications, it found: "These auction rules will serve our goals of providing service to the public expeditiously, ensuring that all qualified applicants have an opportunity to compete for a license, and deterring the submission of speculative applications."¹¹

In addition, of course, auctions recover a portion of the value of the radio spectrum for the public, consistent with the Communications Act's fundamental principle, set forth in Section 301, that spectrum is owned by the public and must be used for its benefit. By enabling all parties interested in providing service to

⁹Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 110 Stat. 3009 (1996) (requiring FCC to award licenses in 2305-2360 MHz band by auction).

¹⁰See, e.g., Second Report and Order, 9 FCC Rcd 2346 (1994).

¹¹Unserved Areas Auction Order at ¶ 5.

participate in the bidding process, the Commission maximizes the likelihood that the auctions will yield the fair market value of that spectrum for the public. In contrast, lotteries benefit only applicants. Given the Commission's radically different experiences with lotteries and auctions, there can be no question here that auctions should be used for all open cellular RSAs.

III. THE RATIONALE FOR THE 1994 LOTTERY ORDER DOES NOT APPLY HERE AND CANNOT OVERRIDE THE CLEAR PUBLIC INTEREST BENEFITS FROM AUCTIONS.

The Public Notice seeking comment on CCPR's petition notes that in 1994, the Commission decided to use lotteries to award unserved area licenses where pre-1993 applications had been filed.¹² The Unserved Area Lottery Order does not support, let alone require, using lotteries for open cellular RSAs. Its rationale is irrelevant given the distinctions between unserved areas and RSAs, and has in any event been superseded by the Commission's extensive and positive experience with auctions.¹³

First, that decision was expressly limited to unserved areas, which are small areas carved out of the MSA and RSA cellular markets, often in remote or unpopulated areas. The Commission relied on the "questionable commercial

¹²Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7387 (1994) ("Unserved Area Lottery Order").

¹³It should also be noted that, of the four Commissioners in office today, only two participated in the Unserved Area Lottery Order. One voted for the decision (Commissioner Quello), and one issued a lengthy dissent (Chairman Hundt). Commissioners Chong and Ness did not participate.

value" of unserved areas as a reason not to auction them. 9 FCC Rcd at 7392.

Indeed the very reason that these areas were being lotteried was because the licensee holding the MSA or RSA license decided there was insufficient demand to provide service there, despite having the authority to do so. In contrast, cellular RSA markets are commercially viable and trade for substantial sums. They lack a permanent licensee only because of the disqualification of the lottery winner, not because of the lack of market demand for service. To the contrary, there has been sufficient demand for cellular service in these RSAs that BANM and other parties have obtained "interim operating authority" to build systems in these markets, despite knowing that their interim authority is temporary and that the full recovery of the investment may be jeopardized when the market is permanently licensed.

Second, the Unserved Area Lottery Order is completely distinguishable for another reason: The Commission there found the risk of speculation was removed by the special "anti-trafficking" rules applicable to unserved areas, but those rules do not apply to RSAs. The 1994 order stated, "any concern regarding speculative applications is mitigated considerably in view of the current rules governing cellular unserved areas. Our rules require that all facilities proposed in the application be constructed and service to the public be initiated within one year from the grant of the authorization. In addition, licensees may not transfer unserved area authorizations until after the facilities have been providing service for one year." 9 FCC Rcd at 7391. There are, however, no such anti-trafficking

rules for cellular RSAs.¹⁴ An RSA lottery winner can thus immediately transfer the authorization, raising precisely the kind of speculative risk that led Congress and the Commission to terminate the lottery procedure.

Third, the unserved area applications in that case had been recently filed. In contrast, the RSA applications in the markets involved here were filed as much as eight years ago, raising serious doubts as to the continuing existence (let alone interest) of the applicants. And, given the literally hundreds of applications for each market (for Ceiba, Puerto Rico, more than 400), no single applicant can have any reasonable expectation of winning. As CCPR notes, if any of the long-pending applicants still has any interest in the markets, it will be much more likely to obtain the license by participating in an auction with others who apply to be bidders than by taking its 1-in-400 chance of winning in a relottery.

Fourth, the Cellular Lottery Order was issued more than two years ago, before the Commission had conducted any auctions and before it had even decided on the ground rules for auctioning any service. Given this lack of experience, the Order was concerned about "administrative confusion and attendant delays, such as the time that may be needed to accept new applications from new parties, the time to allow current applications to be returned and refunds issued, and the time for current applicants to refile their applications under the auction process." 9 FCC Rcd at 7392. The Commission has now, however, had extensive experience

¹⁴The current rule restricting transfers of unserved areas until they are in operation is set forth at Section 22.137(d).

with both generic auction principles and the specific rules for different services. It has adopted rules for eleven different auctions, and such issues as competitive bidding designs, bid increments, stopping and activities rules, and upfront payments have largely been identified and resolved. Moreover, the auction rules do not require burdensome applications; parties merely submit on Form 175 a notice of their intent to participate which contains minimal information, and do not file a complete application until they are declared the winning bidder. Congress's recent direction to the Commission in the recent Omnibus Budget Act not only to create and implement rules for the 2.3 GHz spectrum, but to auction that spectrum in a matter of months, confirms that auctions have become the fastest process to license new radio service.¹⁵

Fifth, many provisions of the 1996 Telecommunications Act are designed to address Congress's concern with providing telecommunications services to rural areas.¹⁶ While many urban markets have enjoyed cellular service for as long as

¹⁵The Cellular Lottery Order's reference to refunding application fees was based on the fact that no lottery had ever been held for the unserved areas, and reflected a concern that applicants had not received what they paid for. As to the RSAs at issue here, however, a lottery was held, and the applicants received what they applied for, a chance (albeit small) to win. If the Commission nonetheless believes that the original applicants should have their application fees refunded, such refunds could be issued separately from the auction, and would not delay the conduct of the auction itself.

¹⁶For example, Section 254 includes the provision of affordable service to rural consumers as a goal of the new universal service fund, and requires interexchange telecommunications services to be offered to rural areas at rates no higher than rates in urban areas. Note also Congress's specific goal of using auctions to extend radio service to rural areas, set forth in Section 309(j)(3)(A).

thirteen years, these rural service areas have remained without a permanent nonwireline cellular licensee only because the lottery winner has been disqualified. This has meant that the only permanent licensee is the wireline carrier, which usually is associated with the landline local exchange carrier. While in some of these RSA markets, interim operators provide A-side cellular service, the competition they provide to the B-side incumbent licensee is necessarily limited by their interim status. Using lotteries would turn a blind eye to the inherent flaws of that process, and perpetuate the very system that has resulted in denial of permanent nonwireline cellular service to these rural areas. Opening these markets to an auction among all bidders interested in providing cellular service is the only proper way to expedite such service. The choice should be clear.

CONCLUSION

The Commission has both the legal authority, and the policy mandate, to award licenses for all remaining cellular RSAs by competitive bidding. BANM asks that it grant CCPR's petition, and commence a rulemaking to set the ground rules for that auction promptly, so that authorizations can be issued to parties who will construct cellular systems in these markets to serve the rural public.

Respectfully submitted,

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Dated: November 25, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of November, 1996, caused copies of the foregoing "Comments of Bell Atlantic NYNEX Mobile, Inc." to be sent by first-class mail or by hand-delivery (*) to the following:

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